IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO. 51 OF 2004

IN

NOTICE NO. N/385 OF 2003

Re : Prasana Govind Bhave & Ors.

.... Judgement Debtors.

Ex-Parte:

The Bharat Co-operative

Bank (Mumbai) Ltd., ... Judgment Creditors.

Mr. K.P. Jain i/by G.R. Mehta for Judgment Crdditor.

Mr. Harmeet Singh Judgment Debtor No. 2 in person.

CORAM : S.U. KAMDAR, J.

DATE : 24th April, 2006.

P.C.:

. The present notice of motion was on Board earlier on many occasions. It has already been adjourned on 13 occasions. On most of the occasions advocates have remained absent. On the last

occasion also the judgment debtor appeared in person and applied for adjournment. I granted the adjournment till today. However, today also advocate is not present. The judgment debtor is present in Court and submitted the written submissions. I have perused the written submissions. There is no merit in each of the submissions set out therein. The first contention raised therein is that he is only the guarantor and, therefore, there is no liability on him to pay. The submission requires to be rejected for the simple reason that there is already a recovery certificate issued under section 101 of the Maharashtra Cooperative Societies Act, 1961 as against the judgment debtor as a guarantor and, therefore, the contention is baseless and without any merit.

2. The next submission made is that the recovery certificate was issued ex-parte on the basis of the documents and statement of accounts implicating the judgment debtor and the same is wrong and erroneous. In my opinion it is not permissible for this Court to go behind the recovery certificate. It was open for the judgment debtor to challenge the same before the appropriate Court and get the same set aside which he has not done and therefore the said recovery certificate stands.

3. The third contention is that the recovery

certificate is ex-parte and the amount was required to be first recovered from the principal borrower itself and not to be recovered from the sureties. The said submission is also without any merit and baseless. It is well settled that the liability of the principal debtor and the guarantor is co-existent and, therefore, the said argument cannot be accepted.

4. The next submission is that the judgment debtor nos. 3 and 4 were not the necessary parties in the Co-operative Court. The aforesaid submission is also required to be rejected on the same reasoning as the earlier submissions are rejected i.e. that the liability of the principal borrower and the guarantors co-exists under the Contract Act and therefore judgement debtor nos. 3 and 4 as guarantors were rightly joined as a party to the said proceedings.

5. The next submission raised is that in view of the provisions of the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 the Co-operative Court had no power and therefore the recovery certificate is without any basis whatsoever. The Full Bench judgment in the case of Shri Narendra Kantilal Shah vs. Joint Registrar, Co-operative Societies (Appeal) Bombay & Ors. reported in 2004 (1) ALL MR 798 is relied upon in

support of the aforesaid submission. The Supreme Court has by an order dated 16.1.2004 stayed not only the operative order in the said case which has been decided by the Full Bench but even the judgment has also been stayed. In that light of the matter, the said judgement can not be accepted as an authority. Therefore the aforesaid submission is also rejected.

6. The next contention is that the amount can be recovered as an arrears of land revenue under Maharashtra Land Revenue Code and, therefore, this Court should not entertain the present petition. The aforesaid submission is also without any basis because it is settled law that insolvency proceedings are not the execution proceedings and are in fact proceedings in rem and, therefore, the said submission has no merit.

7. In that light of the matter, there is no substance in any of the submissions made and therefore the motion requires to be rejected. No order as to costs.